

TAR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PARVEZ & RAZIA YAZDANI : CIVIL ACTION
v. : NO. 2:15-cv-01427-PD
BMW OF NORTH AMERICA, LLC :
and :
BMW MOTORRAD USA, a Division of :
BMW OF NORTH AMERICA, LLC :

FILED

APR 20 2016

MICHAEL E. KUNZ, Clerk
By Dep Clerk

REPLY BRIEF IN SUPPORT OF THE
MOTION OF DEFENDANT, BMW OF NORTH AMERICA, LLC TO
PRECLUDE THE TESTIMONY OF PLAINTIFFS' EXPERT,
WILLIAM J. VIGILANTE, JR.

Defendant BMW of North America, LLC ("BMW NA")¹, filed a Daubert Motion to Preclude the Testimony of Plaintiffs' Expert, William J. Vigilante, Jr. Plaintiffs timely responded. BMW NA now files this Reply in support of its Daubert Motion.

Plaintiffs mischaracterize BMW NA's argument as an attack on the field of human factors and ergonomics as a whole. To the contrary, BMW NA does not doubt that William Vigilante is qualified in this field and could offer reliable opinions about the effectiveness of a product's warnings. ***But he does not do so in this case.*** Rather, BMW NA's attack on Vigilante arises because he has reached a litigation-driven conclusion, but by his own admission did not do the work necessary to support that conclusion, and the logical implications which flow from it. Plaintiffs repeatedly emphasize that Vigilante's methodology included consideration of industry standards and scientific literature. But those general considerations are insufficient; that veneer of science hides an utter failure to ask the questions or analyze the issues raised by Vigilante's

¹ BMW Motorrad USA is a division of BMW NA. Although it is a named defendant in this matter, it is not a separate legal entity.

opinions. A consideration of the logical steps needed to reach Vigilante's conclusions will make clear the lack of methodology underlying his results, and why his testimony should be precluded.

Plaintiffs have a problem. The Rider's Manual that accompanied Mr. Yazdani's motorcycle contained a clear warning that instructed users not to idle the motorcycle at a standstill, or a fire could start. Mr. Yazdani ignored this warning, and did precisely what he was instructed not to do; a fire was the result. We know the warning was clear because Vigilante recommends almost identical language for his version of the warning. Indeed, Mr. Yazdani testified that he understood the warning and the fire would not have occurred if he followed it. See Yazdani Deposition at 93:10-25.

To avoid this problem, Plaintiffs retained a human factors expert, William Vigilante, who needs to find a way to relieve users of the responsibility of reading the manual. Vigilante did exactly that, testifying that an operator had no obligation to read the manual if he thought he knew how to operate the motorcycle. See Vigilante Deposition at 165 ("If you think you can ride a bike without [the manual] then don't read it."); 244 (Q: "And if he knew how – if he thought he knew how to operate [the motorcycle], then he has no responsibility, in your opinion, to read the manual?" A: "I don't think so.").

But the Rider's Manual, like any manual, exists for a reason: to provide important instructions and warnings about the use of a product. If, as Vigilante contends, BMW NA cannot rely on the Rider's Manual to convey information, it then is reasonable to question how that information should be conveyed. Vigilante's conclusion in this case is to convey information by means of an on-product warning.²

² Plaintiffs note that on-product labels were issued as part of an earlier BMW NA recall campaign. However, that campaign involved different issues: an earlier model motorcycle, the R1100RSL, could overheat if left idling at a standstill, in some cases causing its fairing to ignite. The R1100RSL was discontinued, and a label and an insert for the Rider's Manual were issued for products sold before the recall that were still in the field. See Deposition

Conveniently, Vigilante opines only that the specific warning at issue in this case should appear in an on-product warning. The natural question that arises in response to that opinion is why only this particular warning is to be placed on the motorcycle. Is there no other information which otherwise would be in the Rider's Manual – which apparently cannot be relied upon to convey information – that the rider needs to know to safely operate it? Is there no other information within the 89-page Rider's Manual that should appear on the motorcycle itself? Presumably, following Vigilante's conclusions, the remaining 88 pages of the Rider's Manual, which address tires, brakes, headlights, necessary vehicle maintenance, operating instructions, and the like, can safely be ignored.³

Of course, that is not the case. Even Vigilante admitted the obvious implication that, if BMW NA could not rely on its Rider's Manual to impart information, then other portions of the Manual might have to appear on the motorcycle as well. See Vigilante Transcript at 188-90. But crucially, Vigilante did not consider any warnings other than the single warning at issue in this case to determine whether an on-product warning would be necessary. See id. at 194-96. In his own words, he "ha[s] not done that analysis." Id. at 196. Vigilante singled out the warning against idling as one that should appear on the motorcycle, not because he believes it is the most important warning, but because it is the only warning he thinks he needs to evaluate in this case:

Q: Do you think the warning that you've been discussing about the risk of fire is the most important warning in regard to operating this motorcycle?

A: The most important warning with respect to my opinions in this case, yes.

Q: With respect to operating the motorcycle?

Transcript of Mark Yeldham, portions of which are attached hereto as Exhibit "G," at 168-71. The motorcycle at issue in this case, the R1150R, was designed without a fairing. In this case, Plaintiffs challenge the ignition of the oil sight glass, which was not at issue in the recall campaign. Vigilante recognized the distinction at his deposition. See Deposition Transcript of William Vigilante at 109-110.

³ Plaintiffs argue that pointing this out is a "personal attack" on Vigilante and the field of human factors, rather than an exposure of his result-oriented conclusion whose bases can apply only to this case and, therefore, are not scientific.

A: I don't think I went through all the different warnings for operating motorcycles.

Q: So the answer is you don't know?

A: I don't know.

Id. at 221.

By Vigilante's own admission, *he did not do the work* necessary to support his conclusions.

This is not simply a theoretical exercise. Vigilante also agreed that the presence of too many on-product warnings could create clutter and interfere with the awareness and understanding of warnings. Id. at 190. He suggested several methods, including usability testing and focus groups, to evaluate the efficacy of warnings and determine how many warnings are too many. See id. at 210-11. But Vigilante did not do any of those studies either. He did not evaluate any warnings or instructions contained in the Rider's Manual other than the warning against idling at issue in this case. See id. at 194-96.

Plaintiffs argue that Vigilante appropriately confined his analysis to the warning against idling because that specific warning is at issue in this case, and because it would not be relevant for him "to opine on the adequacy of the entirety of BMW NA's user manual." See Plaintiff's Memorandum of Law at 27 of 32. But Vigilante's approach has done exactly that, calling into question the entire manual, and opining that BMW NA cannot rely on it to convey important information. Having done so, and having further opined that some information in the Rider's Manual should appear on the motorcycle itself, of course it is relevant to ask which information should appear on the motorcycle. The question takes on added importance because of the possibility of clutter – too many on-product warnings can interfere with the effectiveness of those warnings, so selectivity and judgment are necessary. Vigilante did not exercise that judgment, but simply ignored the issue.

Plaintiffs respond that Vigilante should not have had to analyze the clutter issue because usability studies and the like are incorporated into the industry standards he claims to have evaluated. See Plaintiffs' Memorandum of Law at 26-27 of 32. But again, Vigilante's analysis was limited to a single warning, cherry-picked for its importance to this case only. Vigilante's opinions lack the necessary context, as nowhere in his report or his testimony does he grapple with the issue of how many warnings are too many. Plaintiffs cite to no industry standard or scientific publication to support their claim that a product seller cannot rely on its manual to convey information, and yet only one piece of information – conveniently the subject of pending litigation – needs to be present in an on-product label.

Thus, Vigilante's reliance on industry standards and literature is insufficient. He used such items as a catch-all for the generic issues of warnings research. Vigilante cites nothing, and has tested nothing, to answer the very basic and important questions his parochial approach to this case raises. Why only one warning on the motorcycle? What other information is necessary on the product if BMW NA cannot rely on its manual to convey important information? How do you resolve the problem of too many on-product labels? These are questions that arise necessarily from Vigilante's approach, regardless of his credentials and the work he has done regarding warnings in general. These are questions which cannot be ignored in any reliably scientific analysis. And these are questions which Vigilante has chosen not to answer. His refusal to do so is understandable, because to answer them would be to reveal the fatal flaw in his approach.

Ultimately, Vigilante's conclusion ignores the obvious implications of his opinions (implications he himself acknowledges), and is not supported by the necessary testing or analysis. BMW NA is asking this Court to act as a gatekeeper, and to preclude the unsupported

and unreliable testimony of William Vigilante. Without the necessary methodology, Vigilante's opinions are nothing more than litigation-driven junk science and should not be admitted. See Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000)(expert should be precluded for lack of demonstrable methodology); Williams v. United States, 321 F. App'x 129, 132 (3d Cir. 2009)(same); Scrofani v. Stihl Inc., 44 F. App'x 559, 562 (3d Cir. 2002)(same); Murray v. Marina Dist. Dev. Co., 311 F. App'x 521, 524 (3d Cir. 2008)(same); Furlan v. Schindler Elevator Corp., 864 F. Supp. 2d 291, 298 (E.D. Pa. 2012)(same).

Respectfully submitted,

**MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN**

BY:

KEITH D. HEINOLD
Attorney for Defendant
BMW of North America, LLC

2000 Market Street, Suite 2300
Philadelphia, PA 19103
215-575-2640 (P)
215-575-0856 (F)
kdheinold@mdwcg.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Defendant, BMW of North America, LLC, was served this date, via the Court's electronic filing system, to the following counsel:

Patrick A. Hughes
de LUCA LEVINE, LLC
Three Valley Square
512 East Township Line Road
Suite 220
Blue Bell, PA 19422

**MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN**

BY: _____

KEITH D. HEINOLD
Attorney for Defendant
BMW of North America, LLC

2000 Market Street
Suite 2300
Philadelphia, PA 19103
215-575-2640 (P)
215-575-0856 (F)
kdheinold@mdwcg.com

DATED: _____

EXHIBIT G

Mark Yeldham

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PARVEZ & RAZIA YAZDANI : CIVIL ACTION
:
:
-vs- :
:
BMW OF NORTH AMERICA, LLC :
: NO. 2:15-cv-01427-PD
:

- - -
DECEMBER 17, 2015
- - -

Oral deposition of MARK YELDHAM, held in the
offices of Marshall Dennehey Warner Coleman & Goggin,
P.C., 2000 Market Street, Suite 2300, Philadelphia,
Pennsylvania, 19103, commencing at 10:20 a.m. on the
above date, before Robin M. Valentini, a Certified Court
Reporter.

- - -
GOLKOW TECHNOLOGIES, INC.

877.370.3377 ph | 917.591.5672 fax

deps@golkow.com

Golkow Technologies, Inc. - 1.877.370.DEPS

Mark Yeldham

Page 166	Page 168
<p>1 got the paint so hot that it would start to blister 2 away from the plastic and then create vapors that 3 could be ignited. 4 Q. The R 1150 R does not have a full fairing; 5 correct? 6 A. Does not have any fairing. 7 Q. Does not have any fairing. 8 A. Correct. 9 Q. I want to make sure I'm not confused, 10 which happens at times and often a lot. 11 The failure modes that we talked 12 about when leaving a bike running in the stationary 13 position or leaving the bike idling in a stationary 14 position, the oil sight glass heat damage to the 15 fairing, you also said heat damage to the wiring 16 harness. 17 A. Yes. 18 Q. That's in addition to the heat damage to 19 the fairings and the oil sight glass failure modes; 20 correct? 21 A. Yes. 22 Q. And in what model motorcycles have you 23 seen, again sticking with the situation of the bike 24 idling and in the stationary position, damage to the</p>	<p>1 A. Yes. 2 Q. Are those incidents that you just 3 described contained within the document production 4 or the 25 claims produced in this case? 5 A. Yes. 6 Q. If you could turn to the next page from 7 the Service Bulletin that you were reading. 8 A. (Witness complies.) 9 Q. Can you tell me what this document is? 10 A. This is talking about a rider manual -- 11 Rider's Manual insert, insert sheet for the 12 operating instructions of R 1100 RS. 13 Q. And I know this isn't a great copy. This 14 is what was, again, up on the NHTSA website. 15 It says: "Warning. Do not keep the 16 engine running while the motorcycle is at a 17 standstill, risk of overheating and fire. Ride away 18 immediately after starting the engine to prevent the 19 air cooled engine from overheating and further 20 damage. Even short warmup periods at a standstill 21 must be avoided. After a cold start avoid high 22 speeds until the engine has warmed up." 23 A. Correct. Yes. 24 Q. Similar to, but not identical to what's</p>
Page 167	Page 169
<p>1 wiring harness that has resulted in a fire? 2 A. I can't remember specifically. I think I 3 may have had an R, like the subject motorcycle. I 4 think I may have had an RS, as well as an RT. 5 And as far as the R and the RS, the 6 area where the harness was damaged is underneath the 7 motorcycle or at the bottom area of the motorcycle, 8 usually in proximity of the side stand, or let's say 9 the center bottom of the motorcycle is where the 10 heat buildup would affect a wiring harness. 11 So, the R and the RS from, let's say, 12 the waist down is basically identical. So, whether 13 I remember if it was an RS or an R, it's basically 14 the same physical parameters. So it could have 15 happened to both or either. 16 And for the RT where I have more 17 bodywork down low, it may have happened as well, and 18 it may have -- you may consider the fact that 19 there's bodywork there. It's going to contain heat 20 and maybe it happened sooner, let's say. 21 But it's basically the same mechanism 22 in all the models. 23 Q. And were those incidents between 1995 and 24 the present?</p>	<p>1 currently in the manual; is that correct, sir? 2 A. That's what I was just looking to see if 3 it was identical or not. 4 Back to -- 5 Q. I think they're 950 and 955. 6 A. Okay. And 950 and 955 were identical? 7 Q. No, no, no. I was just giving you the 8 page numbers. 9 A. No. I'm saying, are those two identical 10 within the same manual? 11 Q. No. 12 A. I just want to see the warning. 13 Q. Sure. Take your time. 14 And the question that's pending is: 15 That's similar to the warning currently in the 16 manual, but not identical; would you agree? 17 A. Yes. 18 Q. In addition to the manual insert with a 19 new warning that BMW NA was sending out to users, 20 were there any other remedies that were a part of 21 this recall? 22 A. No. 23 Q. Okay. 24 A. Oh, I'm sorry.</p>

43 (Pages 166 to 169)

Mark Yeldham

Page 170	Page 172
<p>1 The insert for the Rider's Manual and</p> <p>2 the label that goes on the steering head.</p> <p>3 Q. And what was the label?</p> <p>4 A. That's shown on Page 3 of the Bulletin.</p> <p>5 It's shown in several different languages.</p> <p>6 English being: "Avoid increased</p> <p>7 idle" -- there are six labels shown here, and one of</p> <p>8 them is in English. "Avoid increased idle speed at</p> <p>9 a standstill with choke in use. Risk of overheating</p> <p>10 and fire."</p> <p>11 Q. Whose decision was it to include an</p> <p>12 on-product label as part of the remedy to this</p> <p>13 recall campaign?</p> <p>14 A. BMW AG.</p> <p>15 Q. Do you know why BMW AG decided to include</p> <p>16 an on-product label with this remedy in addition to</p> <p>17 revising the warning and sending out a new manual</p> <p>18 insert?</p> <p>19 A. What they wanted to do was -- well, here's</p> <p>20 the key. As soon as BMW AG investigated this</p> <p>21 problem, and decided that they needed to notify the</p> <p>22 operators, they stopped selling the RSL with the</p> <p>23 lower fairing. So that eliminated the risk of new</p> <p>24 models that have not been produced yet of this</p>	<p>1 label on that.</p> <p>2 Q. Well, wouldn't the insert in the manual be</p> <p>3 sufficient?</p> <p>4 A. Well now you're asking me an opinion</p> <p>5 because I -- the insert in the manual is --</p> <p>6 MR. HEINOLD: You don't have to give an</p> <p>7 opinion.</p> <p>8 MR. HUGHES: And I'm not asking for an</p> <p>9 opinion.</p> <p>10 MR. HEINOLD: It sounded like one.</p> <p>11 MR. HUGHES: I didn't say, what is your</p> <p>12 opinion?</p> <p>13 MR. HEINOLD: You said, wouldn't it be?</p> <p>14 MR. HUGHES: I'm trying to shorten it up.</p> <p>15 I tried getting that past you. He's still</p> <p>16 awake.</p> <p>17 MR. HEINOLD: Barely. But now I'm awake</p> <p>18 again.</p> <p>19 MR. HUGHES: Let me ask it another way.</p> <p>20 I'll get there. Just give me a second.</p> <p>21 MR. HEINOLD: I think you can ask him</p> <p>22 factually what went into that decision if he</p> <p>23 knows.</p> <p>24 MR. HUGHES: Yes. And I think he already</p>
Page 171	Page 173
<p>1 scenario of the blistering of the paint on the lower</p> <p>2 fairing. That eliminated that because there now is</p> <p>3 no lower fairing.</p> <p>4 So, in order to reduce the risk of</p> <p>5 this occurring to motorcycles that have already been</p> <p>6 sold into the stream of commerce, they decided to</p> <p>7 put the label on the motorcycle itself.</p> <p>8 Q. How do you know that information?</p> <p>9 A. Well, it's -- I was -- it's a long time</p> <p>10 ago, but I believe I was told that, and -- yes, I</p> <p>11 was informed by BMW NA Motorrad Department of the</p> <p>12 basics of this recall.</p> <p>13 And I was informed of the decision</p> <p>14 that they would stop selling the motorcycle with the</p> <p>15 lower fairing, the RSL model, in the United States.</p> <p>16 I'm not aware if they stopped selling it in other</p> <p>17 countries. I can only speak for the United States.</p> <p>18 So, it's just the simple logic that,</p> <p>19 if you stop selling the bike, then you don't have a</p> <p>20 reason to put a label on the -- now you don't have a</p> <p>21 reason to put the label on the bike without the</p> <p>22 fairing. But you have a certain number of these</p> <p>23 bikes that have already been sold and they're out on</p> <p>24 the street. They decided they needed to put the</p>	<p>1 testified to that.</p> <p>2 MR. HEINOLD: He doesn't know.</p> <p>3 BY MR. HUGHES:</p> <p>4 Q. Other than what you testified about</p> <p>5 factually what went into the decision to also send</p> <p>6 out a label to be placed on the motorcycle in</p> <p>7 addition to the revised warning and insert?</p> <p>8 A. I have nothing more to offer than what I</p> <p>9 said.</p> <p>10 It's simply the fact that these</p> <p>11 vehicles were already out in the field, and they</p> <p>12 couldn't -- there was no practical way to retrofit a</p> <p>13 new fairing or less of a fairing or cut off the</p> <p>14 fairing.</p> <p>15 And one of the reasons why the RSL</p> <p>16 was sold and the full fairing -- what I'm trying to</p> <p>17 say is that there would be a certain number of</p> <p>18 customers that bought that bike because of the way</p> <p>19 the fairing looked or the way the motorcycle looked</p> <p>20 and by taking the fairing off or half the fairing</p> <p>21 off, it would be more than just a modification to</p> <p>22 address a product issue.</p> <p>23 So, if you take the lower fairing</p> <p>24 away, you no longer have the risk, which is what we</p>

44 (Pages 170 to 173)